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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

NATIONAL COMMODITY AND BARTER ASSOCIATION,
NATIONAL COMMODITY EXCHANGE AND
EXECUTIVE FINANCE COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA, and a
GRAND JURY THEREOF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the First Amendment bars compelled disclosure of the entire membership of a dissident political organization, when the only "criminal" conduct in evidence is the activity of an undercover agent who intentionally manipulated the organization's bank account to structure a cash transaction involving more than $10,000.00.

PARTIES TO THE PROCEEDING

The parties to the proceeding were the United States of America, The National Commodity and Barter Association, the National Commodity Exchange, Paul Carter d/b/a/ Extra Fast Cash and Executive Finance Company.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-

NATIONAL COMMODITY AND BARTER ASSOCIATION,
NATIONAL COMMODITY EXCHANGE, and
EXECUTIVE FINANCE COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA and a
GRAND JURY THEREOF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, by and through their counsel, William A. Cohan of the law firm of Cohan & Greene, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in case number 91-1153, entered July 30, 1992.

OPINION BELOW

The opinion of the Tenth Circuit is reprinted in Appendix A to this petition. The court of appeals' decision was not

reported. The court relied on its earlier decision in the related case, *National Commodity & Barter Ass'n v. United States*, 951 F.2d 1172 (10th Cir. 1991), for its decision in the instant matter, consequently, that decision is also reprinted in Appendix B to this petition.

JURISDICTION

The opinion of the court of appeals in this matter was filed on July 30, 1992. Petitioners' timely Petition for Rehearing was denied on September 11, 1992.[1] The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case is concerned with the First Amendment of the United States Constitution, 18 U.S.C. Section 371, 28 U.S.C. Section 1826, and 31 U.S.C. Sections 5313 and 5324, all of which are reprinted in Appendix D.

STATEMENT OF THE CASE

Jurisdiction in the district court was provided by 18 U.S.C. Section 3231 and 28 U.S.C. Section 1826. Petitioners and certain members of the National Commodity and Barter Association ("NCBA") are the subject of a current federal grand jury investigation in the District of Colorado, which seeks to determine whether the targets have violated the currency transaction reporting laws, 31 U.S.C. Sections 5313 and 5324.[2]

In December, 1989 and February and March, 1990, several grand jury subpoenas were served on Denver-area banks in furtherance of the above-described investigation. Petitioners moved to intervene and to quash these subpoenas. On the basis of NCBA members' affidavits attached to the Petition to Quash, the trial court found petitioners had made a prima facie show-

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[1] *See* Appendix C.

[2] The Assistant U.S. Attorney conducting the investigation has identified NCBA Director John Voss, and NCBA members Mitchell Beals, Brent Beals and Paul Carter as targets of the grand jury's probe.

ing that compliance by the banks would infringe upon petitioners' associational rights. Accordingly, on March 28, 1990, the court held an evidentiary hearing, as required by *In re First National Bank of Englewood, Colorado*, 701 F.2d 115 (10th Cir. 1983), to afford the government the opportunity of showing a compelling need for the records subpoenaed. On May 17, 1990, the trial court entered its Order denying the Petition to Quash.

Petitioners unsuccessfully moved in both the District Court and the Court of Appeals for an order staying compliance with the subpoenas pending the outcome of their appeal. Expedited consideration was granted by the Court of Appeals, and the case was argued on March 4, 1991. The Tenth Circuit's decision relating to the bank subpoenas was issued on December 9, 1991, *see National Commodity & Barter Ass'n v. United States*, 951 F.2d 1172 (10th Cir. 1991) ("*NCBA I*"), reprinted in Appendix B.

On July 6, 1990, six weeks after petitioners filed their original Notice of Appeal in *NCBA I*, four additional subpoenas were served directly on the petitioners' custodians of records, seeking a wide variety of financial information concerning the NCBA's dealings with its members. Petitioners again filed an Emergency Petition to Quash these subpoenas on July 20, 1990. The District Court again held an evidentiary hearing on August 6, 1990, and by Order dated August 27, 1990, again refused to quash or modify the subpoenas, relying on its earlier findings relating to the bank subpoenas.

The petitioners motion for a stay of compliance pending the outcome of the earlier appeal was denied by the district court on November 29, 1990.

Recognizing that appellate jurisdiction required that the matter proceed to contempt,[3] petitioners did not comply with the subpoenas and awaited the filing of a request for an order to show cause, which the government filed on January 3, 1991. The order to show cause issued January 9, 1991. The court held a hearing on the government's request on January 28,

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[3] *See, e.g., United States v. Ryan*, 402 U.S. 530, 533 (1971); *FTC v. Alaska Land Leasing, Inc.*, 778 F.2d 577, 578 (10th Cir. 1985).

1991. On April 11, 1991, the district court issued its order finding Petitioners NCBA, NCE and Executive Finance Company to be in civil contempt, it refused to extend its finding to co-petitioner, Paul Carter d/b/a Extra Fast Cash, since Mr. Carter is a sole proprietor and had been denied act-of-production immunity. Petitioners were ordered to collectively pay $50.00 a day from August 27, 1990 until they comply with the subpoenas. Petitioners timely filed their Notice of Appeal on April 19, 1991 and paid their filing fees. The Court of Appeals denied their request for oral argument and issued its opinion on July 30, 1992. A request for rehearing with suggestion for rehearing en banc was denied on September 11, 1992.

The parties have agreed that compliance with the subpoenas will result in compelled disclosure of the identities of the association's members. NCBA membership records have been persistently pursued by the IRS for over a decade. *See, e.g., Pleasant v. Lovell*, 876 F.2d 787 (10th Cir. 1989); *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987); *Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985); *In re First National Bank of Englewood*, 701 F.2d 115 (10th Cir. 1983). NCBA members' declarations provided to the court demonstrate that compliance with the subpoenas will infringe on the associational rights of NCBA members.

In their zeal to obtain NCBA records, IRS agents have repeatedly violated its members' First and Fourth Amendment rights, even going so far as to photocopy illegally seized information, transport it from Colorado to Minnesota and utilize it as evidence before grand and petit juries, which in turn indicted and convicted NCBA members on the strength of the illegally obtained evidence.[4]

The National Commodity and Barter Association is a non-commercial, non-profit political and educational organization which espouses dissident views regarding the federal reserve and the IRS and advocates the return to currency backed by

[4] Although Circuit Judge Heaney dissented in *United States v. Stelten*, 867 F.2d 446 (8th Cir. 1989), deferring to the Tenth Circuit's decision in *Voss v. Bergsgaard, supra*, the convictions were affirmed. The Eighth Circuit denied the petition for rehearing en banc by an evenly divided court, and the subsequent petition for certiorari was denied.

gold and/or silver. Expression of the association's political, social and educational values takes the form of sponsoring seminars and other educational activities, and the publication and distribution of pamphlets, newsletters and other literature advocating the association's goals and ideals.

1. Purpose of the National Commodity Exchange.

The NCE is a service wing of the NCBA and is operated by NCBA members for NCBA members only. Members operating the Exchange act as agents under individual contracts with other members to buy and sell precious metals for them. Until recently the NCE offered a check-cashing and bill-paying service to NCBA members. From its origins, the NCE service has always been intended to provide a means of boycotting the federal reserve system. One of the corner stones of NCBA teachings is that the Constitution limits the authority to create currency to the federal government, and the present federal reserve system violates this provision because it delegates that authority to a privately-owned banking cartel. One of the primary evils of that system, as viewed by NCBA/NCE Founder John Grandbouche,[5] is the fact that federal reserve notes, commonly referred to as dollars, are not redeemable for anything of real value, i.e., gold or silver. NCBA's warehouse exchange was intended to provide members with a way of circumventing the system while they built an alternative economy around bartering and the exchange of commodities such as gold and silver for goods and services of others. The Exchange concept harkens back to an earlier day when Americans traded in warehouse receipts issued by warehouses with which individuals had stored items of value, usually agricultural commodities. The receipts themselves were a common form of currency, and were exchanged for goods or services much like the present day paper dollar. The receipt represented something tangible, with real value, and a warehouse did not issue receipts for reserves it did not have, unlike the present federal reserve system.

Paper currency is subject to inflation and devaluation, de-

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[5] Mr. Grandbouche's book, *A Declaration of Financial Independence*, published in 1983, presents a detailed explanation of the purposes of the NCBA/NCE.

pending on the whim of the power possessors. Accordingly, NCBA encourages its members to store their wealth in gold and silver and to find ways to conduct their financial affairs exclusively with these or any other types of commodity, rather than federal reserve notes.

2. Mechanics of the Exchange.

As envisioned by Mr. Grandbouche, a network of warehouse exchanges modeled on the Denver NCE service would eventually create its own economy, completely separate from and independent of the federal reserve system, and thereby free its participants from the uncertainties of a monetary system controlled by others. Until a sufficient number of participants had joined the warehouse system, it was necessary to use traditional banks for clearing checks received by Exchange members, and for paying members' creditors who would not accept gold or silver.

To fill this interim need, members operating the Denver NCE service opened checking accounts with local banks and negotiated checks received by members through these accounts. The members each appointed an Exchange staffer as their agent; when a member received a check he would endorse it over to the NCE; a staffer/agent would deposit the check in the NCE account at the bank and, pursuant to the member's instructions, either use the proceeds for purchasing gold or silver, return the proceeds to the member in the form of cash, or use the proceeds to pay the member's bills by writing a check on the bank account opened in the NCE name or purchasing a money order and sending the payment on to the creditor.

The staffer/agent kept track of each user-member's balance by assigning an internal account number to each member. Records of each transaction were sent back to that member. The NCE staffer retained only the most recent transaction record for each member showing the current balance. The NCE account with the bank did not identify any user-member, and only a few staffers had signatory authority with the bank. Only about one-third to one-half the NCBA members ever used the Exchange service. The NCE bank account was also used by the

NCBA for receipt of membership fees, book purchases and contributions for various programs and litigation funds sponsored by NCBA.

After repeated IRS levies[6] on NCBA/NCE bank accounts, occurring between 1985 and 1988, the NCE closed its accounts and began using alternative means of clearing checks for members. For approximately nine months in 1988, two precious metals dealers, Sheffield Metals and PAMEX, agreed to accept third-party checks of NCE members directly for the purchase of gold and silver. The dealers would periodically sell metals for NCE members and return cash to the Exchange office in Denver. This arrangement was discontinued in December, 1988. For a few weeks in December, 1988, NCE used a bank account opened by Petitioner Executive Finance Company, and from January, 1989, until March, 1990, the NCE staffers utilized the services of Paul R. Carter d/b/a Extra Fast Cash[7] to convert checks to cash for members. The Exchange services no longer include clearing checks for members, and Exchange activities have been reduced to assisting members in purchasing and selling gold and silver. The suspension of normal NCE activities in April, 1990, was the direct result of the current grand jury investigation.

3. The Current Grand Jury Investigation.

On or before December 15, 1989, a federal grand jury,

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[6] IRS collection activity was based on a twenty million dollar penalty assessed on April 8, 1985, under 26 U.S.C. § 6700 (abusive tax shelter promoter penalty) against the NCBA/NCE. In June, 1990, IRS issued a new assessment against NCBA under 26 U.S.C. § 6698 (penalty for failure to file partnership returns) in the amount of over four million dollars. This latest assessment was made after the government abated the $20 million penalty by 99% to $176,000, in NCBA's refund action, pending in the District of Colorado (No. 89-M-1912). These penalties demonstrate the IRS has used its resources to punish NCBA members for exercising their First Amendment rights. The 6698 penalty is based on the theory that the alleged criminal conspirators, i.e. all NCBA members, were required to file partnership returns reporting the proceeds of putative criminal activity as income. The latest grand jury investigation is but another episode of the IRS's abusive use of over-broad interpretations of treasury statutes.

[7] Mr. Carter was a petitioner in the court below, and was not found to be in contempt, because his status as a sole proprietor provided him protection under the Fifth Amendment.

Grand Jury 89-1, was impaneled in the United States District Court for the District of Colorado for the purpose of conducting an investigation of petitioners and certain members of NCBA. Grand jury subpoenas were issued in the name of Grand Jury 89-1 to various banks seeking numerous categories of financial records pertaining to the petitioners and certain members of NCBA. Those subpoenas were the subject of the Tenth Circuit's decision in *NCBA I*. The same grand jury proceeding led to the issuance of four subpoenas with target notices attached, on the entities themselves in July, 1990.

The subpoenas at issue are identical.[8] They seek six cat-

[8] The subpoenas each request the following be produced:

For the business or association named above the following records for the calendar years 1986, 1987, 1988, and 1989.

1. Documents used in the course of business, of the above mentioned entities, to record the receipt of monies, or funds in dollars or other means of consideration, received in exchange for services and/or materials. These documents to include but not be limited to journals, ledgers, bank account statements, bank account deposit slips, receipts, profit and loss statements, balance sheets or other means by which the above entity records these types of transactions.

2. Documents used in the course of business, of the above mentioned entities, to record the disbursement or disposition of monies, or funds in dollars or other means of consideration, received in exchange for services and/or materials. These documents to include but not be limited to journals, ledgers, bank account statements, bank account cancelled checks (or carbon copy), statements of account indicating amounts paid to vendors or employees, or other means by which the above entity records these types of transactions.

3. Documents used in the course of business, of the above mentioned entities, which reflect the receipt or realization, either directly or indirectly, of revenue and/or income. These documents to include but not be limited to journals, ledgers, bank account statements, bank account deposit slips, receipts, profit and loss statements, balance sheets or other means by which the above entity records these types of transactions.

4. Documents relating to the Mutual Assistance Program. These documents to include but not be limited to journals, ledgers, bank account statements, bank account cancelled checks (or carbon copy), receipts, profit and loss statements, balance sheets or other means by which the above entity records these types of transactions.

egories of documents for calendar years 1986 - 1989, without limiting the request to financial dealings involving receipt or disbursement of more than $10,000 in cash, although the statutes identified in the subpoenas are only triggered by amounts exceeding $10,000 in cash.

Paragraph four of the subpoenas requests all records related to NCBA's Mutual Assistance Program ("MAP"), which is a fund available to participating NCBA members who wish to set aside monies for support, costs and attorney's fees incurred in administrative, civil or criminal litigation.

At the first evidentiary hearing concerning the bank subpoenas in March, 1990, the government identified two statutes under which it is conducting its investigation, 31 U.S.C. Sections 5313 & 5324. However, the only evidence introduced at the hearing concerned violations of section 5324, which prohibits structuring currency transactions of more than $10,000 with the intent to avoid triggering the currency transaction reporting requirements of section 5313.[9]

The government's evidence showed that one Exchange user

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5. Documents relating to the purchase and sale of precious metals. These documents to include but not be limited to journals, ledgers, receipts, profit and loss statements, balance sheets or other means by which the above entity records these types of transactions.

6. Documents relating to Pacific Metals Exchange (PAMEX), Sheffield Metals and any other related entities. These documents to include but not be limited to bank wire transfers to and from these entities, correspondence to and from these entities, records maintained to record commodities, monies or funds on deposit for these entities, records maintained to record payables and receivables to and from these entities, bank account records reflecting transactions involving these entities including but not limited to bank account statements, bank account deposit slips, bank account cancelled checks, bank cashiers checks and/or bank certified checks.

[9] The government also alleged at the hearing that it was investigating violations of tax laws. However, none of the targets identified at the hearing has received the requisite notice of referral for criminal prosecution under Title 26, which notice is required by 26 C.F.R. § 601.107(c). Furthermore, the government did not allege it was investigating tax violations in its memorandum brief in support of its proposed order for compliance with the bank subpoenas. The subpoenas at issue in the instant appeal identify three statutes: (1) 31 U.S.C. § 5313; (2) 31 U.S.C. § 5324; and (3) 18 U.S.C. § 371.

had deposited a check for $11,000 and requested that it be cashed and returned to him. This individual was admittedly an undercover IRS agent who had joined the NCBA and made use of the Exchange service for the purpose of structuring a transaction. The evidence further indicated that cash had been mailed to the agent in two packages, each less than $10,000, over two days. The government's only witness at the hearing was IRS Special Agent Mike Herrera (not the undercover agent). He testified that he "might" have seen other evidence of one other "structured" cash transaction, but did not provide any evidence thereof. Nor was evidence presented to show anyone else knew of or shared the agent's intent to structure his transaction.

The NCBA produced testimony that currency transaction reports were filed by the bank and Paul Carter d/b/a Extra Fast Cash each time cash was withdrawn from a bank in amounts greater than $10,000.

From post offices used by NCE staffers, the IRS had obtained copies of insurance forms identifying individual members who had been mailed packages insured by Exchange staffers. The amounts of insurance would be indicative of the amount of cash or precious metal contained in each package. However, the testifying agent admitted he had not sought to narrow his subpoenas to correspond to those who could have been identified through these forms as recipients of packages containing more than $10,000 in the aggregate. The agent testified he did not need to make this effort because, as he interpreted the structuring statute, anyone could be guilty of structuring a transaction over any period of time, even if the structuring occurred over more than twelve months, as long as it was done with the requisite intent.

The government is therefore proceeding under the theory that because section 5324 does not contain a time limitation on structuring, anyone who received more than $10,000 in cash over the last several years[10] from NCE may be acting with the intent to avoid the filing of a currency transaction report.

Agent Herrera testified that the postal forms showed over

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[10] Section 5324 became effective in January, 1987.

a period of one year that 1098 parcels were received by 330 individuals or entities, and that the parcels were insured for a total of 2.7 million dollars. Assuming arguendo that each parcel contained only currency fully insured, $2.7 million divided by 330 recipients yields an average total value of $8,018 received by each individual or entity. If the total number of parcels, 1098, is divided into the total insured value, the average parcel contained currency worth $2,452. However, since shipments of gold and silver were also among the parcels included in the agent's statistics, the averages in currency per parcel and per individual or entity were considerably less. Most importantly, there was no offer of evidence as to any individual or business receiving more than $10,000 worth of insured parcels, even assuming that only currency was shipped. Only the undercover agent's transaction would arguably require the filing of a currency transaction report.

The Tenth Circuit upheld the contempt citations in all respects, agreeing with the District Court that the records sought were substantially related to a compelling governmental need, and that petitioners had no "just cause" to defer their compliance with the subpoenas.

REASON FOR GRANTING THE WRIT

THE TENTH CIRCUIT'S OPINION ALLOWS THE GOVERNMENT TO COMPEL PRODUCTION OF THE MEMBERSHIP LIST OF A POLITICAL ORGANIZATION IN VIOLATION OF THE FIRST AMENDMENT FREEDOM TO ENGAGE IN ANONYMOUS ASSOCIATION.

The use of the NCBA Exchange service is an integral part of the expressive association of those NCBA members who use the Exchange. For those who believe that the only valid monetary system is one backed by gold or silver, participation in the Exchange "may be the most effective form of political association." *N.A.A.C.P. v. Button*, 371 U.S. 415, 431 (1963). In light of the political nature of the Exchange activity, the government's attempt to close down the activity through overbroad application of Section 5324 must be reviewed more closely than

did the lower courts, beginning with consideration of the purpose and intent of the statute.

1. Legislative History of Section 5324.

Section 5324 is a recent addition to the Bank Secrecy Act of 1970; the Act and its amendments target money-laundering by drug traffickers and racketeers. The government has utilized the Act and its amendments to conscript all financial institutions into identifying customers who deal in currency.[11]

In 1974, the Supreme Court considered several constitutional challenges to the Act brought by the banking industry, bank customers and the American Civil Liberties Union. *California Bankers Association v. Shultz*, 416 U.S. 21 (1974). While the majority's opinion approved the idea of requiring banks to maintain records and file reports of customers dealing in cash, the concurring and dissenting opinions expressed alarm at the potential for infringement on personal privacy, which had been raised by the ACLU and rejected as not ripe for consideration by the majority.

Since 1974, persons, entities and activities subject to the Act and its implementing regulations (31 C.F.R. § 103.11 et seq.) have been greatly expanded. As of August 13, 1990, banks were required to maintain records of cash purchases of traveler's checks, money orders or cashier's checks involving $3,000 or more. (31 C.F.R. §103.29). The definition of "financial institution" has been expanded to require that a broader range of financial service providers file currency transaction reports (31 C.F.R.§ 103.11(a) & (g)); and in 1986, as part of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, section 5324 was added to Title 31. At the same time a new felony was added to Title 18, Section 1956, which outlaws many forms of dealing in currency, including structuring.[12] Section 1956, entitled "money-laundering", requires the government to prove that the defen-

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[11] Enforcement authority for the Act's reporting provisions is delegated to the IRS by 31 C.F.R. §103.46(c)(2).

[12] Section 60501 of Title 26 also requires the filing of a report with the IRS on cash dealings of $10,000 or more by anyone engaged in a trade or business. The enforcement of this provision against attorneys has received considerable notoriety.

dant had knowledge that the currency involved in the subject transaction was derived from criminal activity. No showing of a criminal nexus is required by section 5324.

Section 5324 was passed to fill a perceived loophole created by decisions in some circuits which vacated convictions of bank customers for structuring currency transactions. These decisions were based on a finding that since only banks were required to file currency transaction reports, customers had no legal duty to conduct their transactions in currency so as to trigger the filing of a CTR; therefore structuring by a customer did not violate section 5313. *United States v. Varbel*, 780 F.2d 758 (9th. Cir. 1986); *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985).

2. Sections 5313 and 5324 Cannot be Constitutionally Applied to NCBA/NCE Activities in such a Manner as to Expose all who Participate in the Federal Reserve Boycott.

In *Gaudiya Vaishnava Society v. San Francisco*, 952 F.2d 1059 (9th Cir. 1991), the court of appeals found the sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message is entitled to complete protection under the First Amendment and therefore could not be subjected to the city's licensing ordinance regulating the sale of merchandise on public sidewalks by nonprofit organizations. Application of sections 5313 and 5324 to the activities of the NCBA Exchange implicates this same unconstitutional taint.

The plaintiffs in *Gaudiya* were five non-profit organizations engaged in a variety of charitable, religious and political activities. They sold items such as t-shirts, books, buttons, stuffed animals, jewelry and bumper stickers. *Id.* at 1060. The court of appeals agreed with the plaintiffs that because their merchandise conveyed "core First Amendment messages (political, religious and philosophical)," their sales activities were fully protected by the First Amendment. *Id.* at 1063.

The court found support for its decision in, inter alia, *Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 3028 (1989); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988); and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), in which the "commercial" component of First Amendment activities was found not to override the protected activity, when taken as a whole.

> Where the pure speech and commercial speech by the nonprofits during these activities is inextricably intertwined, the entirety must be classified as noncommercial and we must apply the test for fully protected speech.

Gaudiya, supra at 1064 (emphasis added). The court of appeals upheld the district court's order permanently enjoining the City from enforcing its ordinance.

Similarly, when taken as a whole, the activities of NCBA/NCE are entitled to full protection under the First Amendment. Indeed, in the instant case, the government has targeted a politically motivated organized boycott of the federal reserve system, not merely the sale of merchandise. Like the NAACP members who boycotted white-owned businesses in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), NCBA members who participate in the Exchange service are engaged in "a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914.

"When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986). The rationale for investigating NCBA's leadership is not compelling with respect to all its members. *Id.* at 260. Legitimate inquiry by the subpoenas is limited in its scope, and in view of the First Amendment context in which the NCBA's activities are carried on, compelled disclosure must be commensurately narrow.

Whether the reporting requirement of Section 5313 applies to the petitioners, and whether it would be constitutional if applied, are highly debatable issues. In such circumstances, a criminal proceeding is an inappropriate vehicle for pioneering interpretations of the law. *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979); *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983). Whether the currency transaction reporting requirements are constitutional when applied to compel the disclosure of membership identities was a question left open by the Supreme Court in *California Banker's Association*, 416 U.S. at 55-56 & 76.

The criminal law concerns itself with willful violations of the law. *United States v. Brooksby*, 668 F.2d 1102 (9th Cir. 1982). Its purpose is not to penalize frank differences of opinion. *United States v. Bishop*, 412 U.S. 346, 361 (1972). *See also, United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) (It is settled that when the law is highly debatable a defendant -- actually or imputedly -- lacks the requisite intent to violate it.)

The evidence presented by the government shows only that an improperly motivated undercover agent may have used the Exchange service to successfully conduct a structured transaction. The evidence further showed this agent was dealt with by an NCE staffer in a manner consistent with the way in which such staffers normally deal with Exchange service users. The staffer or staffers involved with this one transaction were not shown to have knowledge of the agent's motive, nor to have shared that motive. If the staffer was merely carrying out the usual course of his agency with an Exchange user, then he was engaged in the political aim of the federal reserve boycott, for which aim the Exchange service was designed and operated.

The statutes relied on by the government, sections 5313 and 5324, appear to grant discretion to the government to construe NCBA members' use of the Exchange service as an intent to violate these provisions. Such a grant of unbridled discretion renders the statutes and their implementing regulations unconstitutional as applied to this association.

The structuring provision was originally proposed as an

additional subsection under 31 U.S.C. section 5313. *See* H.R. 4573; S. 2306, S. 2683 and S. 2798; S. 2849, S. 2850. Section 5313 and its implementing regulation (31 C.F.R. §103.22) provide a ''single business day'' time frame for aggregating currency transactions. Neither 5324 nor its regulations (31 C.F.R. §§ 103.11(n) (''one or more days'') and 103.53) set forth a time frame for structuring.

In this case, the IRS agent has interpreted section 5324 as allowing him to investigate and charge a violation of this provision, even if the ''structuring'' was aggregated over 12 months. Indeed, nothing in the statute or regulations requires a more narrow interpretation.

Section 5324, by reference to section 5313(a) and by inclusion of a scienter requirement, accommodates the ''place'' and ''manner'' elements of a ''time, place and manner'' regulation, but fails to limit law enforcement discretion as to ''time.'' *Grayned v. Rockford*, 408 U.S. 104 (1972); *Police Department v. Moseley*, 408 U.S. 92 (1972). Thus, the law is vague in this particular and, because of the impact on First Amendment freedoms, this vagueness constitutes a fatal flaw. Under the circumstances presented by this case, there is a higher standard of certainty required in the functional time limits implicit in section 5324 which are explicit in section 5313. *Kolender v. Lawson, supra*, at 358-359. This is definitely demonstrated by Agent Herrera's interpretation of the ''remedial'' 5324 provision, i.e. to remedy the loophole in 5313 by which currency transactions exceeding $10,000 are simply split into two or more transactions and extended beyond 24 hours. The Special Agent replaces the 24 hour limitation with something akin to the Rule Against Perpetuities.

Despite the questionable application of Section 5324, as interpreted, to petitioners' activities, the lower court found the government was pursuing a ''good-faith'' criminal investigation, and therefore refused to either quash or narrow the subpoenas. However, logic requires that the identification of criminal activity precede a finding of a compelling need sufficient to overcome First Amendment privacy protection. *In re First National Bank of Englewood, supra*. Where the government's

interpretation of what constitutes the "crime" involves a statutory interpretation that stretches beyond constitutional boundaries, no compelling interest can be found. The lower courts' reliance on *In re Grand Jury Proceeding*, 842 F.2d 1229 (11th Cir. 1988) and *First National Bank of Tulsa v. United States Department of Justice*, 865 F.2d 217 (10th Cir. 1989), fails to account for the glaring mis-interpretation of the statute at issue. Those cases dealt with tax evasion, not money laundering. In the instant case, the only evidence presented related to Section 5324. The government's showing must stand or fall on this slender thread.

The fact that the structure of the NCE "provides significant opportunities for the evasion of federal tax laws, especially requirements for the reporting of taxable income," *In re Grand Jury Proceeding, supra* at 1230, should not give the government carte blanche to seek the identities of all NCBA members whenever an undercover agent deliberately manipulates that structure at his own initiative, especially where the government's own investigating agent testified that use of a "private banking system" (his characterization of the Exchange service) is not precluded by any law. In light of the constitutional protections afforded expressive associational activities, the government should have been required to show more than it did in order to meet the standard set forth in *In re First National Bank of Englewood, Colorado*, 701 F.2d 115 (10th Cir. 1983).

3. The Appellate Court Erred in Finding all Records Requested Would Bear a Substantial Relationship to the Interest Asserted.

There must be a "substantially relevant correlation between the governmental interest asserted" and its efforts to compel disclosure of membership information. *Shelton v. Tucker*, 364 U.S. 479, 485 (1960). The pertinent test was set forth in *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963):

> [R]egardless of the label applied, be it ''nexus,'' ''foundation,'' or whatever . . . it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.

The list of records sought, attached to each subpoena, makes it apparent that the scope of the inquiry in this case is far broader than a mere investigation of possible CTR violations. The records encompass transactions which are in no way subject to Title 31 reporting requirements. The subpoenas provide *prima facie* evidence that the government is making no effort to limit its investigation to be minimally intrusive or coterminous with its asserted compelling need.

In this regard, Agent Herrera's disclosure that IRS was in possession of Postal Forms 3877 is pivotal for two reasons. First, although he provided statistics from his analysis of the forms, the forms themselves were not proffered by the government at the hearing, despite the fact that the government clearly had the burden of persuasion.

> The production of weak evidence when strong is available can only lead to the conclusion that the strong would have been adverse.

Interstate Circuit, Inc. v. United States, 306 U.S. 208, 225-26 (1936). Agent Herrera could not point to any particular individual, other than the undercover agent, who might have received more than $10,000 in currency from NCE, despite his analysis of the Postal Forms. Of course, had he done so, he might have also been able to limit the grand jury subpoenas to a request for records relating to that individual, or for redacted records.

The Tenth Circuit's reliance on *In re Grand Jury Proceeding*, 842 F.2d 1229 (11th Cir. 1988) and *First National Bank of*

Tulsa v. United States Department of Justice, 865 F.2d 217 (10th Cir. 1989) is misplaced, since neither of those decisions defines the quantum of evidence necessary to establish a substantial relationship between the information sought and the compelling interest.[13]

In the instant case, the only individuals identified as targets are those involved in operating the NCE, and not any Exchange users. In the analogous context of a commercial bank, it would seem necessary that the government first identify one or more customers who had abused the currency transaction laws before it could access information relating to the bank's officials and all its customers.

In *Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985), this Court struck down an "all records" search of the offices of NCBA/NCE. Circuit Judge Logan noted in his concurring opinion that the government had not demonstrated that all of the NCE's activities were illegal. "The purpose of an 'all records' search cannot be to find out what crime a person or entity might have committed." *Id.* at 409.

The same principle applies to grand jury subpoenas. Although the government had identified the statutes under which it is investigating, it has construed them in a patently overbroad manner, while failing to use available evidence to limit the scope of the subpoenas, so that only the identities of NCBA members who have engaged in transactions in currency exceeding $10,000 will be exposed.

4. The Lower Courts Erred in Finding Appellants had not Shown "Just Cause" for Failing to Comply with the Subpoenas.

"[T]he viability of the contempt citation depends upon the validity of the underlying order." *Ager v. Jane C. Stormont Hospital*, 622 F.2d 496, 500 (10th Cir. 1980).

The recalcitrant witness statute, 28 U.S.C. Section 1826,

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[13] Neither decision discusses what evidence the government had against the targets. In In re Grand Jury Proceeding, the Eleventh Circuit noted the information was under seal. 842 F.2d at 1237.

provides that a subpoenaed witness must show "just cause" for his failure to comply in order to avoid contempt. In the instant case, appellants have not produced the documents sought because of their concern that their members' interest in anonymous association will be violated by compelled disclosure of the records requested.

In reviewing subpoenaed grand jury testimony of members of the Black Panther Party, the Ninth Circuit found the subpoenas were tantamount to illegally compelled disclosure of membership information concerning a controversial and dissident organization. The court held:

> In the context of this case, the secrecy of the grand jury proceedings did little to soften the blow to the First Amendment rights. The public did not know what the grand jury learned, but the proceedings were no secret to the Government. A Government lawyer initiated the investigation. A Government lawyer presented the evidence to the grand jury. Political dissidents who criticize the Government may well have more fear about disclosure to the Government than to anyone else, and the Government heard every word.

Bursey v. United States, 466 F.2d 1059, 1086 (9th Cir. 1972).

> Inquiries about the identity of persons with whom the witnesses were associated on the newspaper and in the Black Panther Party ... infringed the right of associational privacy.[ftn]
>
> [ftn]: The depth of the probe into associational privacy is not always apparent from the face of specific questions. It is revealed from the context in which the questions were asked. For example, Bursey questions 12 and 24 and Presley questions 4-12 asked about the activities of named persons. In context of all the questions asked, it is apparent that a purpose of these questions was to identify the associational relationships among

> these people and these witnesses. Asking a witness to identify members of his association one at a time is slower than asking for a membership list, but it is ultimately as effective.

Id. at 1085 & n.19. So here, the financial records subpoenaed are nothing more than a substitute for a membership list, in the eyes of an association charged with the burden of protecting the privacy of its members.

In *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544 (1963), this Court wrote:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] ... effective ... restraint on freedom of association ...This court has recognized the vital relationship between freedom to associate and privacy in one's associations. ... Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.'' (citations omitted).

The ''just cause'' asserted here is the government's failure to show a nexus between the allegedly illegal activity of one undercover agent and the conduct of the affairs of the NCBA/NCE as a whole. *See United States v. Rubio*, 727 F.2d 786, 795 (9th Cir. 1983). The government made no effort to narrow the subpoenas, even when invited by the court to do so.

> One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad.

Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951), *see also. In re Grand Jury 87-3 Subpoena Duces Tecum*, 884

F.2d 772, 774 (4th Cir. 1989) (''if the subpoena is even partially bad, the contempt conviction should be reversed''), rev'd on other grounds sub nom. *United States v. R Enterprises, Inc.*, __ U.S. __, 111 S.Ct. 722 (1991).

CONCLUSION

Given the circumstances of this case, and the history of the IRS's repeated attempts to obtain NCBA membership lists by unlawful means, petitioners submit the trial and appellate courts erred in finding the government had met its burden of showing a compelling interest and a substantial relationship between the association's unredacted financial records and the government's investigation into structuring. Surely associational privacy is entitled to more protection than the lower courts provided in this case; especially where the "compelling" need asserted rests on an extremely dubious statutory construction and evidence manufactured by one undercover agent.

It is easy to understand why the IRS might imagine their evidence to be legally sufficient, if you also assume, as does the IRS, that anyone using the Exchange is motivated solely by a desire to evade the payment of income tax. The assumption is not supported by the record, and the petitioners should not be penalized for attempting to live their lives in a manner which they view as more consistent with the rights provided by the Constitution.

WHEREFORE petitioners request that this Court grant their Petition for Certiorari in order that the Tenth Circuit's decision be reviewed and reversed.

Respectfully Submitted,

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APPENDIX

APPENDIX A-1

Order and Judgement of the United States Court of Appeals for the Tenth Circuit*[1]
July 30, 1992

NATIONAL COMMODITY AND BARTER ASSOCIATION; its service wing, NATIONAL COMMODITY EXCHANGE; EXECUTIVE FINANCE COMPANY,

Plaintiff-Appellant,

and

PAUL R. CARTER, No. 91-1153

Petitioner,

v.

UNITED STATES OF AMERICA, and a Grand Jury thereof,

Respondent-Appellee.

Appeal from the United States District Court for the District of Colorado (D.C. No. 90-Y-20)

Before LOGAN, EBEL, and KELLY, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially

[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Petitioners National Commodity and Barter Association, National Commodity Exchange, and Executive Finance Company appeal the district court's refusal to quash grand jury subpoenas duces tecum served on their respective custodians of records. They also appeal the district court's determination that they are in contempt of court for refusing to comply with the subpoenas.

The parties agree that the issues pertinent to the motion to quash the subpoenas are identical to those decided in National Commodity & Barter Ass'n v. United States, 951 F.2d 1172 (10th Cir. 1991). Petitioners cite the recent case of United States v. P.H.E., Inc., No. 91-4149, 1992 WL 110278 (10th Cir. May 26, 1992), for the proposition that they are entitled to protection from a prosecution brought to interfere with their constitutional rights. We perceive no facts or arguments in this appeal not raised in the prior appeal showing that the government's involvement is a pretext for interfering with constitutionally protected rights. Consequently, P.H.E., Inc. does not mandate reversal.

We review the district court's finding of contempt under 28 U.S.C. § 1826 for abuse of discretion. In re Grand Jury Proceedings (Mallory), 797 F.2d 906, 907 (10th Cir. 1986). According to Petitioners, they had "just cause" for failure to comply: the government "fail[ed] to show a nexus between the allegedly illegal activity of one undercover agent and the conduct of the affairs of the [Petitioners] as a whole." Appellants' Br. at 31.

Here, the district court adjudged Petitioners in contempt of court after they had been ordered twice to produce the subpoenaed documents, once in the prior case and again in this case. Furthermore, Petitioners' argument was rejected in the prior appeal National Commodity & Barter Ass'n, 951 F.2d at 1175 ("The government has also met its burden of demonstrating a substantial relationship between the subpoenaed records and its compelling interest in the

criminal investigation.''). Petitioners do not challenge the amount of the monetary sanction imposed by the district court. Therefore, we find no abuse of discretion in the district court's contempt order.

For the reasons stated in National Commodity & Barter Ass'n, 951 F.2d 1172, the district court's order denying Petitioners' motion to quash is AFFIRMED. For the reasons stated above, the district court's finding that Petitioners are in contempt of court, and its order that Petitioners collectively shall pay $50.00 per day commencing August 27, 1990, until they comply with the subpoenas, are also AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

APPENDIX B-1

Opinion of the United States Court of Appeals
for the Tenth Circuit
December 9, 1991
(Published)

NATIONAL COMMODITY AND BARTER ASSOCIATION, its service wing, NATIONAL COMMODITY EXCHANGE, and PAUL R. CARTER,

Petitioners-Appellants, No. 90-1145

vs.

UNITED STATES OF AMERICA and a Grand Jury thereof,

Respondents-Appellees.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 90-Y-20)

Before MOORE, SETH and BRORBY, Circuit Judges

SETH, Circuit Judge.

This case stems from a grand jury investigation of a private banking system for possible violations of federal money laundering statutes, 31 U.S.C. §§ 5313, 5324. Section 5313 and its implementing regulation, 31 C.F.R. § 103.22, require domestic financial institutions to file a currency transaction report whenever the institution handles a transaction involving United States currency in an amount over $10,000. Section 5324 prohibits the filing of false currency transaction reports as well as the structuring of transactions to avoid the reporting requirements of § 5313.

APPENDIX B-2

Appellants National Commodity and Barter Association (NCBA), National Commodity Exchange (NCE) and Paul Carter appeal the district court's refusal to quash grand jury subpoenas duces tecum served on several Denver area banks. The subpoenas in issue are for *the production of a variety of the banks'* records of transactions handled for a number of named individuals, for NCBA, and for Extra Fast Cash (EFC) (a check cashing business of Paul and Brenda Carter) as hereinafter described.

The NCBA describes itself in its brief as "a non-commercial, non-profit political/educational organization which espouses dissident views regarding the federal reserve and the IRS and advocates the return to currency backed by gold and/or silver."

The NCE is what Appellants describe as a "service wing" of NCBA. It was created to handle financial transactions of NCBA membership, including check cashing, purchase of gold and silver and bill paying. It was operated by NCBA members as a private or warehouse bank.

Until 1988 these transactions were processed through bank accounts in NCE's name in a manner that would insure a high degree of privacy for the member. A member would deliver a check to NCE staffers who would deposit it in an NCE account. Cash was then returned to the member through insured mail. The only records of these transactions maintained by NCE were the current balances of each member. In January 1989, NCBA/NCE began using EFC to convert members' checks to cash. EFC received checks directly from NCBA members, deposited them in an EFC account and delivered the cash to NCBA or NCE for ultimate return to the NCBA members. The return of the cash was asserted to have been done by registered mail.

In late 1989 a federal grand jury began investigating possible violations of currency reporting and structuring statutes by Appellants, EFC and some NCBA members. As mentioned, the grand jury issued subpoenas to several Denver area banks requesting the production of all records of open or closed accounts in the name of or

controlled by NCBA, EFC and several NCBA members. Specifically, the subpoenas requested documents relating to savings accounts, certificates of deposit, checking accounts, loans, credit cards, safe deposit boxes, money orders, wire transfers, cashier's checks, traveler's checks, purchases and sales of treasury bills, IRA/Keogh pension plans, letters of credit and copies of currency transaction reports.

Appellants moved to intervene and quash the grand jury subpoenas on the ground that compliance with the subpoenas would necessarily disclose the identities of members and thus would interfere with the rights of NCBA members to freedom of association under the First Amendment. The district court found that Appellants had made a prima facie showing that compliance by the banks would infringe on NCBA members' associational rights and ordered an evidentiary hearing. Following the hearing, the trial court held that the government had a compelling need for the records, the records bore a substantial relationship to the criminal investigation, and "the relevant information cannot be obtained via less intrusive means." The Appellants' motion to quash was thus denied.

The organizations which have taken this appeal argue that the enforcement of the subpoenas in question would violate the First Amendment rights of their members to freedom of association. The standing of the organizations to assert such rights of their members was decided in In re First Nat'l Bank, Englewood, Colo., 701 F.2d 115, 118 (10th Cir.), and indirectly in Eastland v. United States Servicemen's Fund, 421 U.S. 491.

This Court has had occasion to rule on similar cases involving NCBA. See Pleasant v. Lovell, 876 F.2d 787 (10th Cir.); Grandbouche v. Clancy, 825 F.2d 1463 (10th Cir.); In re First Nat'l Bank, Englewood, Colo., 701 F.2d 115 (10th Cir.). But even cases involving NCBA and addressing similar issues cannot be relied upon here because organizations change their purposes, causes, directions and methods. For example, this case deals with an investigation of money laundering through a third party, EFC, which has not been addressed in the previous NCBA cases. Also, in this case, there is no evidence of NCBA's educational activities in the form of seminars, meetings and

publications which have been used in past cases to support First Amendment claims. See, e.g., Grandbouche at 1466. Therefore, this case will be decided on the facts presented to this Court in the record without regard to past NCBA activities.

Appellants claim that release of the subpoenaed records would reveal the names of members of NCBA and subject them to investigation and harassment by the Internal Revenue Service (IRS). Appellants argue that this will have a chilling effect on the members' First Amendment rights. Affidavits attached to Appellants' Motion to quash describe harassment by the IRS, loss of membership and an unwillingness of potential members of NCBA to associate with the organization due to fear of investigation by the IRS. The district court found that these affidavits constitute a prima facie case of infringement of associational rights.

We held in First Nat'l Bank, Englewood, Colo., 701 F.2d at 118-19, that when a party makes a prima facie showing of First Amendment infringement, the government must show a compelling need to obtain the documents identifying petitioner's members. Further, the government must show that the records sought bear a substantial relationship to this compelling interest. In re Grand Jury Proceeding, 842 F.2d 1229, 1232-33 (11th Cir.), citing NAACP v. Alabama, 357 U.S. 449, 646.

Appellants contend that the district court erred by ruling that the government met its burden of showing a compelling need for the subpoenaed records. We do not agree. In First Nat'l Bank of Tulsa v. United States Dept. of Justice, 865 F.2d 217 (10th Cir.), this Court held that "'[a] good-faith criminal investigation into possible evasion of reporting requirements through the use of a private banking system that keeps no records is a compelling interest.'" Id. at 220 (quoting In re Grand Jury Proceedings, 842 F.2d at 1236). The situation before us is the same as that in First Nat'l Bank of Tulsa. There is nothing in the records to suggest that the grand jury investigation into violations of the §§ 5313 and 5324 reporting requirements is being pursued in bad faith.

Additionally, there is a presumption of regularity that attaches to a grand jury subpoena. The party challenging the subpoena has the burden of proving any irregularities. First Nat'l Bank of Tulsa, 865 F.2d at 219. Appellants have not met this burden. The government's investigation of NCBA and NCE activities, therefore, constitutes a compelling interest.

The government has also met its burden of demonstrating a substantial relationship between the subpoenaed records and its compelling interest in the criminal investigation. The grand jury is investigating possible violations of 31 U.S.C. §§ 5313, 5324. To aid its investigation, the grand jury has subpoenaed fifteen categories of documents and records of transactions. The fact that the subpoenas are broad in scope does not suggest that the government cannot show a substantial relationship to a compelling interest. Some of these records admittedly are not subject to the currency transaction reporting requirements. The broad scope of the subpoenas is necessary, however, due to the complex nature of the United States financial system and the numerous ways money can be moved within it.

Moreover, Special Agent Herrera testified at the evidentiary hearing that all of the subpoenaed records are necessary to determine if there has been a violation of the currency transaction reporting requirements. This testimony demonstrates a substantial relationship between the subpoenaed records and the government's compelling interest.

The organizations bringing this appeal also argue that 31 U.S.C. §§ 5313 and 5324 are unconstitutional as applied to them. We cannot decide this question because §§ 5313 and 5324 have not yet been applied to NCBA/NCE activities. See ACORN v. City of Tulsa, Okla., 835 F.2d 735, 744 (10th Cir.). This Court "will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied." Aspury Hosp. v. Cass County, 326 U.S. 207, 213-14. Therefore, Appellants' "as applied" challenge to the constitutionality of §§ 5313 and 5324 is premature.

Accordingly, the order of the district court denying Appellants' motion to quash is **AFFIRMED**.

APPENDIX C-1

Order of the United States Court of Appeals
for the Tenth Circuit
September 11, 1992
Denying Petition for Rehearing

NATIONAL COMMODITY AND BARTER ASSOCIATION; its service wing, NATIONAL COMMODITY EXCHANGE; EXECUTIVE FINANCE COMPANY,

Petitioners-Appellants,

and

PAUL R. CARTER,

Petitioner,

v. No. 91-1153

UNITED STATES OF AMERICA, and a Grand Jury thereof,

Respondents-Appellees.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 90-Y-20)

Before LOGAN, EBEL, and KELLY, Circuit Judge

This matter is before the court on Appellants' petition for rehearing. The materials submitted by Appellants have been reviewed by the members of the hearing panel.

The petition for rehearing is denied. The Order and Judgment in this case was not based upon any theory that Appellants received

notice of the legal insufficiency of their actions in the related case of National Commodity & Barter Association v. United States, 951 F.2d 1172 (10th Cir. 1991). We affirmed the district court because Appellants lack any just cause for failure to comply with the subpoenas in this case. The district court did not abuse its discretion in finding Appellants in contempt.

Entered for the Court

ROBERT L. HOECKER, Clerk

APPENDIX D-1

Constitutional provision and federal statutes

First Amendment

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. Section 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

28 U.S.C. Section 1826

§ 1826 Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause

shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of --

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

31 U.S.C. Section 5313

§ 5313. Reports on domestic coins and currency transactions

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(b) The Secretary may designate a domestic financial

institution as an agent of the United States Government to receive a report under this section. However, the Secretary may designate a domestic financial institution that is not insured, chartered, examined, or registered as a domestic financial institution only if the institution consents. The Secretary may suspend or revoke a designation for a violation of this subchapter [31 USCS §§ 5311 et seq.] (except a violation of section 5315 of this title [31 USCS § 5315] or a regulation prescribed under section 5315 of this title [31 USCS § 5315]), section 411 of the National Housing Act (12 U.S.C. 1730d) [12 USCS § 1730d], or section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b) [12 USCS § 1829b].

(c)(1) A person (except a domestic financial institution designated under subsection (b) of this section) required to file a report under this section shall file the report --

(A) with the institution involved in the transaction if the institution was designated;

(B) in the way the Secretary prescribes when the institution was designated; or

(C) with the Secretary.

(2) The Secretary shall prescribe --

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and

(B) the way the institution shall submit reports filed with it.

31 U.S.C. Section 5324

§ 5324. Structuring transactions to evade reporting requirement prohibited

APPENDIX D-4

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction --

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

Supreme Court, U.S.
FILED
DEC 31 1992
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No. 92-1042

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

NATIONAL COMMODITY AND BARTER ASSOCIATION,
NATIONAL COMMODITY EXCHANGE AND
EXECUTIVE FINANCE COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA, and a
GRAND JURY THEREOF,

Respondents.

PETITIONERS' SUPPLEMENTAL APPENDIX

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SUP

APPENDIX E-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Miscellaneous Action No. 90-Y-20

IN RE: GRAND JURY 89-1
PROCEEDING CONCERNING:

NATIONAL COMMODITY AND BARTER ASSOCIATION; NATIONAL COMMODITY EXCHANGE; PAUL R. CARTER, d/b/a Extra Fast Cash; and EXECUTIVE FINANCE COMPANY,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR CONTEMPT

Sherman G. Finesilver, Chief Judge

This matter comes before the court on respondent's motion for contempt for petitioners' failure to comply with grand jury subpoenas duces tecum, numbers 11479CR through 11482CR, filed October 26, 1990. For the reasons stated below, respondent's motion for contempt is hereby GRANTED IN PART AND DENIED IN PART. Petitioners National Commodity and Barter Association, National Commodity Exchange, and Executive Fi-

nance Company are held in contempt. Petitioner Paul Carter is not held in contempt.[1]

I.

Four subpoenas were served on petitioners on July 6, 1990. On July 20, 1990, petitioners filed an emergency petition to quash the subpoenas. After an evidentiary hearing held on August 6, 1990, the court denied the motion on August 27, 1990. National Commodity & Barter Ass'n v. United States, No. 90-Y-20, slip op. (D.Colo. Aug. 27, 1990).[2]

The court denied a motion to stay compliance on November 29, 1990. National Commodity & Barter Ass'n v. United States, No. 90-Y-20, slip op. (D.Colo. Nov. 29, 1990). The court ordered that petitioners comply by December 10, 1990. On January 3, 1991, the government advised the court that petitioners had not complied with our November 29, 1990 order and sought the issuance of an order to show cause why petitioners should not be

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[1] The court has addressed civil contempt in the grand jury context in In re Grand Jury Proceeding 90-1 (Relating to Donald Bullick), 754 F.Supp. 829 (D.Colo. 1990), and In re Nigro, 555 F.Supp. 65 (D.Colo.), aff'd, 705 F.2d 1124 (10th Cir. 1982), cert. denied, 461 U.S. 927 (1983).

[2] Based upon a substantially similar situation, the court denied a like motion in National Commodity & Barter Ass'n v. United States, No. 90-Y-20, slip op. (D.Colo. May 17, 1990). This order was appealed to the United States Court of Appeals for the Tenth Circuit. Upon the government's motion, the Tenth Circuit agreed to expedite consideration of the appeal. National Commodity & Barter Ass'n v. United States, No. 90-1145, slip op. (10th Cir. Oct. 5, 1990). Oral argument was held before Judges Seth, Moore, and Brorby on March 4, 1991.

held in contempt. A hearing was held on the order to show cause on January 28, 1991. At this hearing, the court ordered the parties to submit briefs regarding the imposition of a contempt citation on Paul Carter, a sole proprietor.

II.

We believe that petitioners National Commodity and Barter Association, National Commodity Exchange, and Executive Finance Company have been provided with more than adequate opportunity to comply with the subpoenas or present just cause for their refusal to comply with this court's orders. They have failed to do both. Accordingly, we find petitioners National Commodity and Barter Association, National Commodity Exchange, and Executive Finance Company in contempt of court.

III.

At the January 28, 1991 hearing, petitioners' exhibit 1 was admitted into evidence, indicating that Paul Carter is a sole proprietor. Under United States v. Doe, 465 U.S. 605 (1984), the owner of a sole proprietorship cannot be compelled to produce business records without a statutory grant of immunity under 18 U.S.C.A. Sections 6002 and 6003 (1985 and West 1990). Id. at 614-17; see also United States v. Clark, 847 F.2d 1467 (10th Cir. 1988); United States v. Schmidt, 816 F.2d 1477, 1480-81 (10th Cir. 1987). He has not been granted immunity. Accordingly, Mr. Carter is not held in contempt of court.

IV.

ACCORDINGLY, it is hereby ordered:

1) Respondent's motion for contempt is hereby GRANTED IN PART AND DENIED IN PART.

2) Petitioners National Commodity and Barter Association,

National Commodity Exchange, and Executive Finance Company are in contempt of court. These parties are ordered to collectively pay $50.00 a day starting from August 27, 1990, until they comply with the subpoenas.

3) Petitioner Paul Carter is not in contempt of court.

Dated this 11th day of April, 1991, at Denver, Colorado.

By the Court:

Sherman G. Finesilver, Chief Judge
United States District Court

SUPREME COURT, U.S.
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No. 92-1042

In the Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL COMMODITY AND BARTER ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly denied petitioners' motion to quash grand jury subpoenas directed at petitioners' business records and properly held petitioners in civil contempt for refusing to comply with the subpoenas.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A3) is unreported, but the judgment is noted at 972 F.2d 356 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992. A petition for rehearing was denied on September 11, 1992. Pet. App. C1-C2. The petition for a writ of certiorari was filed on December 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners National Commodity and Barter Association (NCBA), National Commodity Exchange (NCE), and Executive Finance Company seek review of a court of appeals' decision affirming the orders of the United States District Court for the District of Colorado, in which the court refused to quash a series of grand jury subpoenas directed at petitioners' business records and held petitioners in contempt for refusing to comply with the subpoenas.

1. NCBA is a non-profit organization that advocates abolishing the Federal Reserve System and the Internal Revenue Service (IRS) and returning to a currency system based on precious metals. See *National Commodity & Barter Ass'n* v. *United States*, 951 F.2d 1172 (10th Cir. 1991) (*NCBA I*), *reprinted in* Pet. App. B1-B6. NCBA created NCE to serve as a "warehouse" bank, handling NCBA members' financial transactions such as check cashing, bill paying, and precious metal purchases. Pet. App. B2. Under that system, NCBA members would endorse third-party checks to NCE, which would then deposit the checks into one of the NCE accounts. NCE used the funds in the NCE accounts to pay members' bills and make other financial transactions, tracking members' individual balances through its own internal account numbers. Until 1988, NCE conducted its financial transactions through various bank accounts. In 1988, NCE closed those accounts and began using other institutions, such as Executive Finance Company and Extra Fast Cash (EFC), to convert members' checks into cash. *Ibid.*

In late 1989, a federal grand jury began an investigation into whether petitioners and others were violating federal currency transaction reporting statutes, 31 U.S.C. 5313 and 5324. As part of its investigation, the grand jury issued subpoenas to several Denver area banks seeking production of all records of open or closed bank accounts in the name of or controlled by NCBA, EFC, and several NCBA members. NCBA, NCE, and EFC moved to quash the subpoenas on the ground that production of the bank records would necessarily reveal the names of NCBA members, thereby interfering with the NCBA members' First Amendment right to freedom of association. The district court found that petitioners had made a prima facie showing that compliance with the subpoenas would infringe their First Amendment rights and ordered an evidentiary hearing. Pet. App. B2-B3.

At the hearing, IRS Special Agent Michael Herrera testified about a transaction by an undercover government agent posing as an NCBA/NCE member. The agent sent a check for $11,796 to NCE and received by return mail two packages of cash, each containing $5,666. In addition, Paul Carter, who operated EFC, testified that he used EFC accounts to convert NCBA members' checks to cash, returning the cash to NCBA. He testified that when completing currency transaction reports (CTRs), see 31 C.F.R. 103.22, he identified NCBA as the recipient of the cash, knowing that the cash was actually destined for individual NCBA members. The government also presented evidence obtained from postal insurance forms indicating that NCBA or NCE had made more

than 1000 insured mailings containing more than $2.7 million in cash. See Gov't C.A. Br. Add. 5-6.

On May 17, 1990, the court denied the motion to quash. The court held that the government had demonstrated a compelling need for the records, the records bore a substantial relationship to the investigation, and the information could not be obtained through less intrusive means. Pet. App. B3. The court of appeals affirmed, rejecting petitioners' argument that the subpoenas violated NCBA members' First Amendment rights. *Id.* at B3-B6. It declined to decide petitioners' challenge to the constitutionality of 31 U.S.C. 5313 and 5324 as applied to them, concluding that the challenge was premature. Pet. App. B5.

2. Shortly after the district court denied the motion to quash the bank subpoenas, a federal grand jury investigating NCBA's private banking system served subpoenas on NCBA, NCE, Executive, and Paul Carter, directing them to produce certain business and financial records. Gov't C.A. Br. 1-2. Petitioners and Carter moved to quash the new subpoenas on the ground that the subpoenas violated the First Amendment right to freedom of association, contending once again that the currency transaction reporting statutes were unconstitutional and that the subpoenas were overbroad.

On August 27, 1990, after another evidentiary hearing, the district court denied petitioners' motion to quash and ordered them to comply. The court concluded that the new subpoenas did not violate the right to freedom of association, that the subpoenas were not overbroad, and that petitioners' constitu-

tional challenge to the statutes was premature. The court subsequently found petitioners in civil contempt and ordered them collectively to pay $50 per day, beginning August 27, 1990, until they complied with the subpoenas. See Pet. Supp. App. E1-E4. The court of appeals affirmed. Pet. App. A1-A3.

ARGUMENT

Petitioners challenge the court of appeals' decision on the ground that it allows the government to compel production of petitioners' business records "in violation of the First Amendment freedom to engage in anonymous association." Pet. 11. The courts below correctly rejected that argument, holding that the government had "met its burden of demonstrating a substantial relationship between the subpoenaed records and its compelling interest in the criminal investigation." Pet. App. A3, B5.

1. Petitioners contend at the outset (Pet. 13-17) that the grand jury subpoenas should be quashed because the First Amendment exempts petitioners' operations from the federal currency transaction reporting statutes that provide the basis for the criminal investigation, 31 U.S.C. 5313 and 5324. As the court of appeals explained, petitioner cannot foreclose a grand jury investigation by preemptively attacking the laws that provide the basis for the investigation on the ground that those laws would be unconstitutional "as applied" to them. Pet. App. B5.

The grand jury is conducting an investigation into possible violations of the currency transaction reporting statutes, and the courts have concluded that the information sought by subpoena is needed to complete the investigation. If the grand jury returns

an indictment, petitioners will then have ample opportunity to attack the constitutionality of the statutes as applied to them. Until that time, however, petitioners' claim that they are constitutionally exempt from currency transaction reporting statutes is premature. See, *e.g.*, *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 213-214 (1945) (courts "will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied"); *ACORN* v. *City of Tulsa*, 835 F.2d 735, 744 (10th Cir. 1987); *Kines* v. *Day*, 754 F.2d 28, 31 (1st Cir. 1985).* Moreover, disruption of the orderly progress of grand jury proceedings, in order to adjudicate such prematurely asserted claims, would be especially inappropriate. See generally *United States* v. *Calandra*, 414 U.S. 338, 349-350 (1974).

2. Petitioners also contend that the breadth of the government's inquiry will infringe the rights of their members to "anonymous association." Pet. 11, 17-19. As this Court has explained, the right to associate for expressive purposes is not absolute. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984). The government may compel disclosure of membership

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* Petitioners argue (Pet. 13-14) that the Ninth Circuit's decision in *Gaudiya Vaishnava Society* v. *City & County of San Francisco*, 952 F.2d 1059 (1991), cert. denied, 112 S. Ct. 1951 (1992), which exempted certain non-profit sales activity from a city ordinance, supports their constitutional argument. That decision, however, did not involve a grand jury investigation, nor does it allow a premature "as applied" challenge to the statutes that provide the basis for the investigation.

information, even when that information is presumptively entitled to First Amendment protection, if it can show that the information sought to be disclosed bears a substantial relationship to a compelling governmental interest. *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 464 (1958).

The court of appeals has twice held in this case that the government has a compelling interest in conducting its good faith criminal investigation into whether NCBA is using its private banking system to evade federal currency transaction reporting requirements. See Pet. App. A2-A3, B4. See also *First Nat'l Bank* v. *United States Dep't of Justice*, 865 F.2d 217, 220 (10th Cir. 1989); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988). The subpoenaed documents are substantially related to that compelling interest, because it is only through analysis of the NCBA/NCE financial records that the government can determine whether the currency transaction reporting requirements have been violated. See Pet. App. B5.

The subpoenas are not overbroad in light of the inquiry the government must make. The government's subpoenas seek a broad variety of information, but that is "due to the complex nature of the United States financial system and the numerous ways money can be moved within it." Pet. App. B5. Contrary to petitioners' arguments below, the government is not limited to records involving transactions of more than $10,000 on any given day. Section

5324 can be violated by structuring a transaction to take place over a longer period of time, and the grand jury must have sufficient information to determine whether that has occurred here. See, *e.g.*, *United States* v. *Brown*, 954 F.2d 1563, 1565-1566 (11th Cir.), cert. denied, 113 S. Ct. 284 (1992); *United States* v. *Nall*, 949 F.2d 301, 306-308 (10th Cir. 1991); *United States* v. *Scanio*, 900 F.2d 485, 491-492 (2d Cir. 1990). See also S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986).

3. Petitioners contend (Pet. 19-22) that the district court erred in finding them in civil contempt under 28 U.S.C. 1826. They argue that they demonstrated "just cause" for their failure to comply with the subpoenas. Petitioners base their claim of "just cause" on the assertion (Pet. 21) that the government failed to show a nexus between the undercover agent's transaction with NCE and the conduct of the affairs of NCBA and NCE as a whole. That assertion provides no basis for a finding of "just cause." Petitioners have been ordered to produce subpoenaed documents, and despite that order they have refused to comply. Pet. App. A2. The district court and the court of appeals properly held in response to petitioners' motion to quash that the government had demonstrated its entitlement to those documents. *Id.* at A2-A3. Petitioners' "just cause" contention is simply an improper attempt to relitigate a question that has been correctly decided against them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1993